Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

NO. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

NO. .....

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of *Certiorari* issue to review the final order of the United States Court of Appeals, Fifth Circuit, 607 F.2d 1133 (5th Cir. 1979), entered on December 7, 1979, which reversed the judgment of the district court for the Northern District of Alabama awarding to J. Truett Payne Company, Inc. the sum of Three Hundred Seventy-Three Thousand Seven Hundred Forty-Two and 44/100 Dollars ($373,742.44) for a violation of the Robinson-Patman Act in the following entitled case:

CHRYSLER CREDIT CORPORATION, a corporation,	)	Plaintiff
v.	)	
J. TRUETT PAYNE COMPANY, INC.,	)	Defendant, Third Party Plaintiff - Appellee
v.	)	
CHRYSLER MOTORS CORPORATION	)	Third Party Defendant, Additional Party Defendant, Appellant

NO. 77-2331

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

In addition, Petitioner respectfully prays a Writ of *Certiorari* issue to review that final order of the United States Court of Appeals, Fifth Circuit, on to-wit, March 18, 1980, which overruled and denied Petitioner's Petition for Rehearing, or in the Alternative Rehearing *En Banc*.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit is reported in *Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*, 607 F.2d 1133 (5th Cir. 1979). That opinion sought to be reviewed is also contained in the Appendix, pg. 1. The order overruling and denying a Petition for Rehearing, or in the Alternative Rehearing *En Banc*, was entered

on March 18, 1980, and is set forth at Appendix, pg. 7. The Appendix is separately presented from this Petition.

JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, reversing the trial court's judgment in this case was entered on December 7, 1979. Petitioner's Application for Rehearing, or in the Alternative Rehearing *En Banc* was denied on to-wit, March 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This Petition was filed within ninety days of the Fifth Circuit's order denying a rehearing.

QUESTIONS PRESENTED

1. Does the court's requirement that the disfavored automobile dealer must affirmatively show actual lost sales to favored competitors as the *only* means of proving damage, rather than permitting the jury's appropriate inference of damage to stand, impose an inflated standard of proof under the Robinson-Patman Act thereby effectively preventing enforcement of the Act by private attorneys general?

2. In a market where keen competition exists between competing retail automobile dealers, does an automobile manufacturer's substantial price discrimination, totaling $81,248.94, against one of its dealers during a three and one-half year period, permit an inference of actual damage to the disfavored dealer so that a jury's verdict finding such damage should be sustained?

3. Does the same standard of proof regarding damage in a "public injury" Robinson-Patman Act case apply in this "private" Robinson-Patman Act case?

4. When there is both an inference of damage and direct proof of damage to the disfavored retail automobile dealer

as a result of the automobile manufacturer's price discriminations, is it permissible for the jury to award damages to the disfavored dealer at least in the amount "indicated" by the sum of the price discrimination?

THE STATUTES INVOLVED

The pertinent provisions of the Robinson-Patman Act, 15 U.S.C. § 13, a copy of which in full is set forth at Appendix, pg. 28, is set forth below:

> It shall be unlawful for any person engaged in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure or destroy or prevent competition with any person who either grants knowingly or receives the benefit of such discrimination or the customers of either of them. . . .

In addition, 15 U.S.C. § 15 states as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the main controversy and shall recover three-fold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

STATEMENT OF THE CASE

This price discrimination case was tried in the United States District Court for the Northern District of Alabama,

Southern Division, before the Honorable Judge Seybourn Lynne sitting with a jury. The jury returned a verdict of $111,247.48 against Chrysler Motors Corporation, which was trebled and an attorney's fee added. Judgment against Chrysler Motors Corporation was entered in the amount of $373,742.44. Chrysler's Motion for judgment notwithstanding the verdict or for a new trial was denied by Judge Lynne.

The evidence in that trial showed as follows:

J. Truett Payne Company (hereinafter "Payne") had been a Chrysler-Plymouth retail automobile dealer in Birmingham, Alabama, since approximately 1944 (Tr. 40). During a three and one-half year period from January 1971 until Payne was forced out of business in May 1974, Payne competed with three other Chrysler-Plymouth dealers in a market of exceedingly tough competition in Birmingham-Jefferson County, Alabama. Customers shopping for new cars compared Payne's prices with each of the other three Chrysler-Plymouth dealers[1] competing with Payne (Tr. 46, 124). Chrysler Motors Corporation (hereinafter "Chrysler") had been paying rebates to Payne and the other competing dealers on various cars they purchased from Chrysler since the early 1960s. These rebates were paid under the terms of rebate or incentive programs which Chrysler formulated during that period. For the last five years of its operation, Payne lost money each year. During the time frame with which this law suit is concerned, Chrysler created approximately sixteen rebate or incentive programs, each lasting several months, under which it made payments to the four competing Chrysler-Plymouth dealers in the Birmingham-Jefferson County, Alabama market area. Chrysler

[1]Those competing Chrysler dealers were Roebuck Chrysler-Plymouth, Central Motors, and Bessemer Chrysler-Plymouth (which was later changed in 1972 to Vestavia Chrysler-Plymouth).

unilaterally assigned each dealer a separate and different quota for wholesale purchases and/or retail sales which each had to satisfy in order to obtain the rebate payments. The rebate payments Chrysler made to a dealer on a particular car under all of the rebate programs reduced the price of that new car purchased from Chrysler by the dealer and had an effect on and influenced the price charged the customer by a dealer (Tr. 56, 62).

In almost every program, Chrysler signed Payne a higher quota than its competing dealers and Payne had to meet that higher quota in order to receive the rebate payment. In other words, Payne had to either sell more new cars or purchase more new cars from Chrysler in order to obtain a rebate payment from Chrysler on those new cars. Compared to the other dealers, Payne actually paid much more for each car in almost every rebate program and had a total discrimination of $81,248.94. As a result of the high quotas assigned Payne and the rebates paid by Chrysler to the other qualifying dealers, Payne lost sales because it was at a trade disadvantage with those competing dealers (Tr. 69).

The rebates paid on a particular car by Chrysler reduced Chrysler's price charged the dealer on that car. (Tr. 256, 617-618). Payne's lost sales reduced its cash flow so that Chrysler Credit Corporation withdrew its floor plan credit line to Payne, forcing Payne to close down (Tr. 68-69). These rebate programs were one of the causes that put Payne out of business (Tr. 100). Because of the rebate programs, Payne ended up forcing business in order to make a sale and was losing some customers and sales (Tr. 65-67; 91-92; 94-95; 126-127). In order to make a sale of a new car, Payne had to over-allow on the used car traded in by the customer (Tr. 55, 711-712). Payne had to sell at a smaller profit than it could afford to sell in order to compete effectively, and generally it did not meet the lower

prices of the other dealers. (Tr. 91; 124). The rebate programs and the payments made by Chrysler to the various dealers affected the price at which the cars were offered to the public because the rebate effectively lowered the cost to the dealer per unit per car (Tr. 125).

Dr. George Ignatin, an economist at the University of Alabama, testified that the rebates paid by Chrysler per car under those rebate programs reduced each dealer's cost of that car which had been purchased from Chrysler (Tr. 265). Dr. Ignatin is thoroughly familiar with the car market in Birmingham and did several studies about the Birmingham market (Tr. 201; 695). Chrysler's rebate programs reduced competition in Birmingham market between Chrysler dealers and had an adverse effect on competition (Tr. 222). As a result of the rebate payments to the competing dealers, Payne could not compete as well with the other dealers because it got less of a price reduction on the cars (Tr. 203). It is well known in the industry that all dealers discount off list price in setting the retail price of a car to consumers. Because of these rebate payments, Payne could not discount its cars from list price as much as it could if it had received the same rebate per car as the other dealers competing with Payne at that time; and the other competing dealers therefore did not have to discount their price on new cars as much as they otherwise would have done had Payne received an equal rebate per car from Chrysler. The ultimate effect of the Chrysler rebate programs was to increase the retail price to a consumer (Tr. 202-204; 205).

The price discrimination caused by the rebate programs was one of the causes of Payne's going out of business (Tr. 100; 706).[2] Without those price discriminations, Payne

[2]In its opinion on December 7, 1979, the Fifth Circuit stated that Dr. Ignatin prefaced his testimony on the issue of the rebate programs causing Payne to go out of business by stating that "I really can't tell you without having you know – it's a hypothetical question." Actually, this statement

could probably have made a profit and stayed in business. Dr. Ignatin reviewed and analyzed each of the rebate programs and showed for each program how much more money each competing dealer received on a per car basis than did Payne under that same program. The payments for each program were made by Chrysler only on the type or model car described in program rules. In almost every instance, different amounts were paid to each dealer on each particular model for which a dealer qualified during a period of the program's duration. Dr. Ignatin's analysis of those programs compared the monies received by Payne with the monies received by the other favored dealers, and showed the actual monetary difference that each dealer received on a per car basis during each program[3] during that three and

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was not made by Dr. Ignatin with respect to the issue of whether or not the rebate programs caused Payne to go out of business. Dr. Ignatin made that statement with respect to whether or not, in his opinion, a company like Chrysler could devise an incentive program that paid a dealer monies based on that dealer's strength and potential compared to other dealers. See Tr. 705-706. That statement by Dr. Ignatin had nothing whatsoever to do with his opinion that the rebate programs, as applied to Payne, were, in fact, discriminatory and caused Payne to go out of business.

[3]In order to not be tedious, each individual program will not be analyzed in this statement of facts. However, in order to show the Court an example of the type of rebate program involved, we will analyze the first program known as "Winter Winners" which ran for a period of two and one-half months during 1971. Chrysler assigned Payne a wholesale purchase quota of ninety-nine (99) new cars which must have been purchased from Chrysler by Payne in order to receive rebate payments on new cars that Payne sold to customers. The rebate payments would be made by Chrysler to Payne and the other dealers on the retail sales made by each dealer, thereby reducing the cost to each dealer of that particular car sold. Chrysler assigned Central Motors a wholesale purchase quota of sixty-three (63) units, Roebuck Chrysler-Plymouth only fifty-four (54) units, and Bessemer only thirty-nine (39) units. In that program Payne did not qualify for any rebate payments because it could not meet its wholesale purchase quota. All the other competing dealers did qualify and received rebates on every car they sold at retail, in amounts ranging from $30 to $60 per model. During that period when the program was in effect, Payne would have received a total of Five Thousand Two Hundred Eighty Dollars ($5,280.00) in price reductions on the various new cars that it sold if it

one-half year period. The total amount of price discrimination against Payne during this period was $81,248.94 (Tr. 191). Of the sixteen programs analyzed, only three were non-discriminatory to Payne. Two of these programs did not have different purchase or sales quotas established for the various dealers, but had identical quotas. Only in one rebate program where different quotas were established for each dealer was Payne not disfavored. Payne did not claim any damages resulting to it from those three programs. (See the "Stock Eliminator" program "Chrysler-Plymouth Early Clean Up Bonus," and "C-Body Bonus" at Tr. 158, 178, 184, 186).

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

This case was brought in the trial court under the Robinson-Patman Act, 15 U.S.C. § 13 and under § 4 of the Clayton Act, 15 U.S.C. § 15, which permit a suit in the United States District Court by any person who shall be injured in his business or property as a result of anything forbidden in the anti-trust laws, specifically the Robinson-Patman Act.

REASONS FOR GRANTING THE WRIT

The decision below severely undermines private plaintiffs' rights to enforce the Robinson-Patman Act since that

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had received the same rebate per car sold that the other dealers did in fact receive from Chrysler at that time. This Five Thousand Two Hundred Eighty Dollar ($5,280.00) figure was the total price discrimination during that program.

Charts showing the rebate payments to each dealer under all rebate programs, the resulting reduction in unit cost from Chrysler to each dealer and the total price discrimination to Payne for each program are attached to the Appendix, pp. 10-27. These charts represent Dr. Ignatin's analysis of the Chrysler rebates and their effect of price discrimination on Payne. Each chart was introduced as an exhibit in the trial. The abbreviations on each chart are explained in the introduction to the Appendix.

decision imposes an unwarranted standard of damage proof requiring proof of actual lost sales and profits as the *only* means of proving damage to the plaintiff's business. The Fifth Circuit's opinion conflicts with the following decisions of the United States Supreme Court and other circuit courts of appeal which have held that a jury is entitled to infer injury to the plaintiff when the plaintiff has been disfavored by substantial price discriminations in a market of keen competition: *Perkins v. Standard Oil Company,* 395 U.S. 642 (1969); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 124 (1969); *F.T.C. v. Morton Salt Co.,* 334 U.S. 37 (1948); *Hanson v. Pittsburg Plate Glass Industries, Inc.,* 482 F.2d 220 (5th Cir. 1973), *cert. denied,* 414 U.S. 1136; *Bruce's Juices v. American Can Co.,* 87 F. Supp. 985 (S.D. Fla. 1949), aff'd, 187 F.2d 919 (5th Cir.), modified on other grounds and rehearing denied, 190 F.2d 73 (5th Cir.), *cert. dismissed,* 342 U.S. 875 (1951); *Foremost Dairies, Inc. v. F.T.C.,* 348 F.2d 674 (5th Cir. 1965).

The decision below should be reviewed because it erroneously interprets and fails to apply to the facts in this case the governing principles of the Robinson-Patman Act. In addition to those cases cited above, the decision below was contrary to a decision of this Court and three decisions of other United States Courts of Appeal which have held that, once illegal price discrimination is proved, the plaintiff is entitled to recover damages equal, at least, to the amount that the plaintiff was charged illegal discriminatory higher prices: *Bruce's Juices v. American Can Co.,* 330 U.S. 743 (1947); *Grace v. E. J. Kozin Co.,* 538 F.2d 170 (7th Cir. 1976); *Fowler Mfg. Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988, 996 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945). Those cases held that damages should be awarded in the minimum amount of

the illegal discriminatory prices which obviously diminished the profits of the disfavored purchaser and helped to destroy its financial ability to withstand competition from the more favored competitors. The court below, in the instant case, although admitting that there was some precedential support for permitting damages in the amount indicated by the sum of the price discrimination, failed to follow those precedents.

There was more than ample evidence, as set forth in the statement of facts in this Petition, that showed damage to Payne's business. The market in which Payne competed was one of exceedingly tough competition where customers compared the prices of the various competing automobile dealers. The amount of price discrimination on the various automobiles on which Chrysler reduced the price to Payne's competitors was substantial, sometimes as much as $300 per car.[4] Since the price discriminations were substantial, compared to the dealer's profit on a typical sale, and Payne's business showed losses during the relevant time frame which were not attributable to causes other than the price discrimination, the case law is clear that damage to Payne's business should be inferred. *F.T.C. v. Morton Salt Co., supra.,* at 50; *American Motors Corp. v. F.T.C.,* 384 F.2d 247 (6th Cir. 1967), *cert. denied,* 390 U.S. 1012 (1968); *Perkins v. Standard Oil Co., supra.; Hanson v. Pittsburg Plate Glass Industries, Inc., supra.* at 227; *Zenith Radio Corp. v. Hazeltine Research, Inc., supra.; Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 143 (1968); *Bargain Car Wash, Inc. v. Standard Oil Co.* (Ind.), 466 F.2d 1163 (7th Cir. 1972); *Foremost Dairies, Inc. v. F.T.C., supra.; E. Edelmann & Co. v. F.T.C.,* 239 F.2d 152 (7th Cir. 1956).

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[4]See for example plaintiff's exhibit 52, attached to the Appendix at page 25.

The Fifth Circuit refused to apply the principles of the above cited cases in this instance because, according to the court, there cannot be an inference of damage in a private case unless there is proof of actual lost sales. Such reasoning imposes on the plaintiff the almost impossible burden of "proving a negative", i.e. that plaintiff may only recover if it can prove no sale, and hence no profits, because a favored dealer used its anticipated favorable price discrimination to lower the retail price for the car to the consumer. Actually, this reasoning overlooks the crucial fact that Payne was reducing its sale's price and over-allowing on its used car trade-ins in order to maintain its sales. Thus, there might not have been a substantial loss of sales that could be shown by statistical evidence; but there could have been a substantial loss (for instance on the sale of used cars) and a lessening of Payne's capital position and ability to compete against its competitors. These latter facts were proved, as well as the fact that the price discrimination was one of the factors causing Payne to go out of business. *See, e.g.* Tr. 97-100, 706; *See also,* Tr. 539, 593-599 where Chrysler's own witness claims that Payne lost money on its used car operations causing it to go out of business.

This case, therefore, is of nationwide importance in determining whether the principles of law under *Morton Salt* and its descendants are still applicable in a private anti-trust case. In addition to the question involving the *Morton Salt* principles of law, the admitted split among the circuits on whether damages can be at *least* the amount of the illegal price discrimination should impel the Court to grant the Writ of *Certiorari* to the Fifth Circuit Court of Appeals.

ARGUMENT

I. The Fact Of Damage Was Proved.

In *Perkins v. Standard Oil Company, supra,* the Court specifically held that if there is any evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury's determination. (*Id.* at 648). The jury in the instant case concluded that Chrysler's rebate programs caused damage to Payne. Payne more than met the burden of showing just an inference of damage; it proved by direct evidence the fact of damage. The following items of proof were presented to the jury showing that there was, in fact, damage caused by the anti-trust violations of Chrysler's rebate programs:

(1) Dr. George Ignatin testified that Payne would not have gone out of business had it not been for the price discrimination to it in the rebate programs. (Tr. 706). The going concern value of Payne at that time was $170,000 (Tr. 210-218).

(2) Dr. George Ignatin testified that the Chrysler rebate programs had caused, in fact, an injury to competition by making consumers pay a slightly higher price for cars because Payne's competitors did not have to reduce their prices below list price quite as far as they would otherwise have done had Payne not been charged a higher price. Payne's competitors were able to get better profits by virtue of being sold the cars by Chrysler at a lower price and being able to reduce the price to the consumer easier than Payne. (Tr. 203-204). This hurt Payne's ability to compete in this tough market (Tr. 202-203), eventually being a cause of its demise.

(3) Mr. J. Truett Payne, President and chief operating officer of his company, testified that in selling new cars,

Payne had to "over-allow" on the used car trade-ins in order to obtain business and Payne also had to reduce the gross profit margin on the new cars sold in order to obtain the new car sales. (Tr. 65-67, 91-92, 94-95, 126-127). He also testified that the rebate programs were one of the causes of Payne going out of business (Tr. 68-69, 100).

(4) Because of this "over-allowing" on trade-ins, Payne lost money on its used car operations (Tr. 97-100, 539, 593-599) which caused the line of credit extended by Chrysler Credit Corporation to be withdrawn. This lessened Payne's capital position and weakened its ability to compete in a market of very keen competition with other Chrysler-Plymouth dealers.

There was evidence of keen competition in the market (Tr. 44-46, 124) and large rebate payments by Chrysler to Payne's competitors on the various programs, sometimes as much as $300 per car. (See for example the analysis of the "Super Earnings" rebate program which shows the results of the rebate payments to the various dealers under that program, Appendix p. 25). Such evidence is enough by itself for a jury to infer damage under the *Morton Salt* and *Hanson* cases. Therefore, it is clear that there was substantial evidence in the record to permit the jury to find, as it did, causation of actual injury to Payne's business by the Chrysler rebate programs. At the very least, the jury could have found an inference of injury to Payne's business where the market was one of keen competition and the price differentials on the cars were substantial. Numerous cases hold it is the jury's prerogative to infer damage from the price discrimination in such a situation. *Perkins v. Standard Oil Co., supra; Zenith Radio Corp. v. Hazeltine Research, Inc., supra* at 124; *Perma Life Mufflers, Inc. v. International Parts Corp., supra* at 143; *F.T.C. v. Morton Salt Company, supra* at 49; *Bargain Car Wash, Inc. v. Stan-*

dard Oil Co., 466 F.2d 1163 (7th Cir. 1972); *Foremost Dairies, Inc. v. F.T.C.*, 348 F.2d 674 (5th Cir. 1965); *E. Edelmann & Co. v. F.T.C.*, 239 F.2d 152 (7th Cir. 1956).

The Fifth Circuit mentioned that Payne's share of the retail market in Birmingham does not show a substantial reduction which could be attributable to the price discrimination, therefore, showing a loss of customers. However, Payne's testimony was to the effect that in order to *keep* business, it had to over-allow on trade-ins and reduce its gross profit in the sale of new cars. Therefore, Payne's share of the new car market might not have diminished substantially. What was diminished was Payne's profits and Payne's ability to compete in the market place, so much so that it was caused to go out of business.

The Fifth Circuit states that Payne misapplies the holding of *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948), because inference of damage in a public case from the "substantial price difference" does not necessarily show inference of damage in a private case. Having indicated some doubts as to viability of *Morton Salt,* the court said that mere proof of substantial price difference is not sufficient to show the fact of damage.

The Supreme Court, in *Morton Salt* stated the test applicable to both public and private cases:

> . . . the competitive opportunities of certain merchants were injured when they had to pay [seller] substantially more for their goods than their competitors had to pay.

(334 U.S. at 46-47)

In addition, this Court held that a merchant compelled to pay a higher price would actually be injured competitively. (*Id.* at 48)

Contrary to the Fifth Circuit's opinion, it has previously accepted as recently as 1973 the viability of the principle that damage is inferred from price differentials, as set out so clearly in *Morton Salt*. In *Hanson v. Pittsburg Plate Glass Industries, Inc., supra* at 227, the court stated:

> Nevertheless competitive injury may be inferred when one set of customers buys at *substantially lower* prices than other customers. *Federal Trade Comm'n v. Morton Salt Co.* . . . . (emphasis added)

That the favored dealers during each rebate program got substantially lower prices than Payne cannot be denied. True, the payment from Chrysler usually came after a dealer made a wholesale purchase or retail sale; but that payment nonetheless reduced the cost of the new car to the dealer. Therefore, *Morton Salt* is directly applicable to show not only competitive injury, but damage to the non-favored purchaser. To otherwise argue would clearly be unrealistic because when one business can obtain its inventory at a lower price than another competitor, it matters not whether the favored business uses its lesser cost to reduce the ultimate price to the consumer or pockets the difference to weather the uncertainties of competition and the economy. The net result will always be, as it was in the case involving Payne, that the price discriminations have a significant impact on the vigor and health of the non-favored business, injure its competitive opportunities, and cause it damage in actual fact. Actual lost sales may or may not also be the effect of the discrimination.

Additionally, the Fifth Circuit in *Foremost Dairies, Inc. v. F.T.C., supra* at 680, held that "an inference of injury may be properly indulged" where the price discrimination, even though *not* reflected in the retail sales price, if reflected in the sales price would have affected the consumer decision to purchase. As previously mentioned, the rebates

sometimes were as high as $300 per car. Clearly, a price difference of $300 on a consumer's single most important purchase of personal property is more than ample to affect the consumer's decision to purchase. Therefore, Payne is not merely relying, as the court implied in its opinion, on a price difference. Rather Payne is relying on testimony of (1) the adverse effect that the price differences had on competition (2) on Payne's ability to compete being reduced considerably in the tough market (3) on the large price differentials (4) on the fact that Payne had to over-allow on used cars and reduce his gross profit on new car sales because of its competitors receiving cars at less cost (5) on the fact that Payne lost money, and (6) on the fact that the rebate programs were one of the causes of its going out of business. It could be said that Payne was selling more, but enjoying it [profits] less.

II. Amount Of Damage

There is substantial case law, some cited by the Fifth Circuit in its opinion in this case, supporting the rule that in a market of keen competition the amount of the illegal price differential will be the minimum damage to the non-favored purchaser. However, the Fifth Circuit failed to even cite or follow two cases directly in point: *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757 (1947) and *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, *aff'd.*, 187 F.2d 919 (5th Cir.), modified on other grounds and rehearing denied, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951).

The Supreme Court has held in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757, that the amount of the damages are at least the amount of price discrimination:

> For despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover

> *three times the discriminatory difference without proving more than the illegality of the prices.* If the prices are illegally discriminatory, the petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination. (emphasis added)

The district court in *Bruce's Juices v. American Can Co., supra,* stated emphatically on remand:

> This discrimination in favor of the plaintiff's above-named competitors was manifestly harmful to plaintiff's business, for the reason that the cost of juice cans represented a large percentage of the total cost of this citrus product, and the discriminatory higher price paid by plaintiff for [its cans] diminished its profits and helped *destroy its financial ability to withstand competition.* (emphasis added)

(87 F. Supp. at 990)

The Fifth Circuit affirmed the district court's decision at 187 F.2d 919.

As any retail seller knows, if his competitor obtains the product from the manufacturer at a cheaper price, it will certainly be to that competitor's advantage in the marketplace, making it easier for that competitor to draw customers away from the disfavored retail seller and to withstand the fluctuations of spirited competition. It does not matter whether or not the competitor uses the price difference to lower the price of the product, to award as an incentive to his salesmen to do a better job in selling customers, to hire an advertising agency to draw customers to the favored competitor, or for extra profit. The end result of using the favored price difference will always be that the favored competitor will enhance his capital position and be better able to compete in the marketplace *at the expense of* the disfavored seller. The disfavored seller will suffer by losing customers or dropping out of business in the lean years and

weak markets, while the favored competitor has become strong enough to survive during weak market with periods of losses. Such is the instant case where Payne was forced out of business not so much by lost sales, but by a weaker capital position and continuing losses created by Chrysler's price discrimination.

In the instant case, evidence was presented to the jury that Payne's ability to compete and withstand the competitive forces in the market was drastically lowered by virtue of the price discrimination in the rebates paid by Chrysler to Payne's competitors. (Tr. 65-67, 203). The amount of the price differential favoring Payne's competitors on their purchase of new automobiles was $81,248.94, a substantial amount of money by any company's standards. This Court, at the very least, should adopt the rule, previously adopted by it in *Bruce's Juices v. American Can Co., supra,* which permits the plaintiff to recover damages for illegal price discrimination at least in the amount of the price differential.

The precepts of the Supreme Court's *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), referred to the opinion of the Fifth Circuit, do not prohibit Payne from recovering damages for the price differential. To the contrary, the *Brunswick Corp.* case, if applicable at all, supports Payne. In that case, the Court held that the plaintiffs were not damaged in their business by reason of the defendant's acquisition of failing companies in violation of Section 7 of the Clayton Act. The plaintiffs there had claimed that, were it not for the prohibited acquisition, they would have obtained *more* business through the customers of the failing companies after those companies had failed. When the defendant acquired those companies, the business did not go to the plaintiffs. The court held that anti-trust laws provided a damage remedy for losses directly resulting from the violation of the antitrust laws and not for every single

violation if there was not the proximate cause connection. The loss of future additional customers was so remote that it was not a loss contemplated as being "caused" by the violation of the Clayton Act. For all practical purposes, the *Brunswick* case was a proximate cause case, holding that the damages claimed by plaintiffs were too far removed and not caused by the antitrust violation.

In the instant case, it is clear that the rebate programs directly caused Payne two separate categories of damage redressable under the Robinson-Patman Act: (1) reduction of profits on current sales, i.e., loss of profits by over-allowing on used cars and selling retail at lower prices in order to retain business, and (2) the going concern value of Payne's business which the rebate programs caused to fail. The going concern value of Payne was approximately $170,000. (Tr. 210-218). Clearly, the above injury to Payne is exactly the type of loss and damage that the Robinson-Patman Act was designed to compensate.

Courts have held in numerous cases that, after showing an injury to the business resulting from the violation of antitrust laws, all that plaintiff must do is show "some indication of the amount of the damage done."[5] *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974). Payne clearly showed substantial evidence that it had been damaged by virtue of Chrysler's rebate programs favoring Payne's competitors. Therefore, one "indication" of the amount of damage would be the price differential.

[5]In the Fifth Circuit's opinion in this case, the court erroneously set a higher standard of proof by saying that the plaintiff must show "at least the *approximate amount* of the damage". That higher standard is not appropriate in this case.

The trial court charged the jury that the amount of the price differential could be considered by it in determining the amount of any damage that it might find Payne suffered, but that amount was not automatically the amount of any damage. (Tr. 806-807). The Fifth Circuit held that there was not substantial evidence proving actual damage to Payne. If this Court feels that the damages for the loss of Payne's business—that is the going concern value—might be too speculative, *at the very least* this Court should not permit the Fifth Circuit's reversal to stand since it prohibits a new trial on the issue of the amount of damages. This Court, at the very minimum, should permit a new trial on the issue of damages so that the jury could consider the price differential and determine what damages, if any, to award.

If this Court adheres to the Fifth Circuit opinion and rejects the price differential damage cases cited in that opinion,[6] the Court would destroy antitrust plaintiffs' abilities to enforce the anti-trust laws. In effect, this Court would be requiring that Payne prove by *direct* evidence (as opposed to inferential evidence) a negative, i.e. that Payne lost sales and the amounts of those lost sales. This burden is not appropriate in this type of case where a disfavored seller strives to retain sales by reducing its profits and overallowing on the trade-ins. Payne's injury to its business is just as severe in this case where no lost *sales* may be shown, but a continuing loss in profits is caused by the illegal price discrimination.

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[6]In its opinion, the Fifth Circuit cited numerous cases supporting what it called the "Robinson-Patman automatic damages concept." However, the court stated that it declined to follow that rule, although admitting there was substantial precedential support. *See, Fowler Manufacturing Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988, 996 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945); *Grace v. E. J. Kozin Co.,* 538 F.2d 170 (7th Cir. 1976).

CONCLUSION

The issues presented here are substantial and of nationwide importance. The Fifth Circuit's opinion has effectively undermined the application of the damage rule in one of the most important anti-trust decisions that this Court has ever rendered, *F.T.C. v. Morton Salt Co., supra.* If allowed to stand, the Fifth Circuit's decision will dramatically affect the ability of private anti-trust plaintiffs to redress legitimate grievances.

Not only has the Fifth Circuit misapplied the law with respect to the fact of damage, but it refuses to accept the Supreme Court's decision in *Bruce's Juices v. American Can Co., supra,* and other circuit court decisions permitting, at a minimum, an award of damages to the disfavored purchaser in the amount of the illegal price discrimination. The very nature of the Robinson-Patman Act, prohibiting price discriminations, would make its enforcement a hollow and empty shell if a plaintiff were required to prove specific lost sales and specific lost profits resulting from the price discrimination. It would be almost impossible to prove a negative, i.e. that the disfavored purchaser lost a specific sale because its more favored competitor used a price discrimination to reduce the sales price to the customer. Actually, that favored competitor might use the price discrimination to enhance its capital position to withstand losses which inevitably occur to dealers during weaker markets. Therefore, once the fact of damage is proved from substantial price discrimination, the most effective way of insuring enforcement of the Robinson-Patman Act is to permit damage awards in the amount, at least, of the price differential.

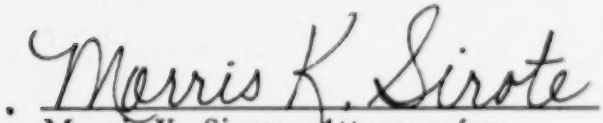
In the instant case Payne not only proved the fact of damage and showed the substantial amounts of price discrimi-

nation, but it also proved that the price discrimination was one of the causes that put it out of business. In such case, Payne is entitled to at least the amount of the price discrimination; and if not overly speculative, it is also entitled to the jury's award of its going concern value above and beyond the amount of the price discrimination. Both of these elements of damage were ignored by the Fifth Circuit's opinion reversing the District Court.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.



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PROOF OF SERVICE

I, Morris K. Sirote, attorney for J. Truett Payne Company, Inc., a corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 9th day of ~~April~~ June, 1980, I served copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, together with appendices thereto, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Hon. J. Fredric Ingram and Hon. J. Ross Forman, III, 1600 Bank for Savings Building, Birmingham, Alabama 35203, attorneys for Chrysler Motors Corporation, a corporation.

It is further certified that all parties required to be served have been served.

This the 9th day of ~~April~~ June, 1980.

Morris K. Sirote

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